

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**EMPIRE STATE REGIONAL COUNCIL OF CARPENTERS,
AND ITS AFFILIATE CARPENTERS LOCAL UNION 19,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA**

and

Case No. 2-CC-2748

HOSPITAL BUILDING & EQUIPMENT COMPANY

Nicole Buffalano, Esq., Counsel for the
General Counsel
Bradley S. Hiles, Esq., Counsel for the
Charging Party
Marty Glennon Esq., Counsel for the
Respondents

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on March 4 and 5, 2009. The charge and the amended charge were filed on November 3, 2008 and January 9, 2009. The Complaint that issued on January 28, 2009 alleged that on November 3, 2008, the Respondents engaged in picketing at a construction site at the gate reserved for union and neutral employers, in furtherance of a primary dispute with New York Professional Drywall Corp., herein called NYPD.

Findings of Fact

I. Jurisdiction

The Complaint alleges, the Answer as amended at the hearing admits, and I find that NYPD and Hospital Building and Equipment Company, herein called HBE, are employers engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act and persons as defined by Section 8(b)(4)(i) & (ii) (B) of the Act. Also based on stipulations by the parties, I find that the Empire State Regional Counsel of Carpenters and Carpenters Local 19, United Brotherhood of Carpenters and Joiners of America are labor organizations within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice

This case involves the construction of a new hospital in Middletown New York called the Orange Regional Medical Center. The General Contractor for this construction project is

Hospital Building & Equipment Company, (called HBE), which is a Missouri corporation that specializes in hospital construction. HBE, in turn subcontracted much of the construction work to a group of about 40 subcontractors, about half of whom were union signatories and half were non-union. New York Professional Drywall Corp. is a local carpentry contractor that won the bid for putting up drywall for some of the initial portions of the construction. This company, herein called NYPD, is a non-union contractor.

Empire State Regional Council of Carpenters and its affiliate Carpenters Local Union 19, United Brotherhood of Carpenters and Joiners of America are affiliated labor organizations. It was stipulated that the each is an agent of the other. Their representatives who were involved in this case were Leo Grabowski and Robert Owens. At some point during the bidding process, the Union became aware that NYPD was making a bid. The Union's representatives became involved and tried to promote the bid of a competitive contractor who had a collective bargaining agreement with the Union. That effort failed and NYPD was successful in obtaining the contract.

NYPD's management representatives began appearing at the job site in or about June or July 2009. But their presence was in relation to contractor management meetings and NYPD's employees did not actually start regularly performing physical work at the site until about October 6, 2008.

The construction site lies adjacent to East Main Street to the south and Midway Park Drive to the east. To the north and west, the site is abutted by trees and is generally inaccessible to vehicular traffic. In the aerial photograph of the site, (GC exhibit 4), the picture is taken so that East Main Street appears on the left side of the picture and Midway Park Drive appears at the top of the picture. Within the construction site, a perimeter road has been constructed and this is connected to the public streets by newly built entrances off East Main and off Midway Park Drive.

Excavation work at this site began some time in the Spring of 2008. At that time, the entrance off East Main had been built but the entrance off of Midway Park Drive was not finished.

During the summer of 2008, HBE caused two entrances to be set up for the job site because having a mixed group of union and non-union contractors at the site, it wanted to avoid or mitigate any picketing that might occur as a consequence of this situation. Gate 1 was established at East Main Street and read:

STOP-READ
GATE #1
THIS GATE IS RESERVED FOR ALL
PERSONEL VISITORS AND
SUPPLIERS OF THE CONTRACTORS LISTED BELOW:
Darlind Construction –Schenectady Steel
Boyce Excavation
J. Mullen & Sons

Gate 2 was set up at an entrance to the site that was constructed to connect to Midway Park Road. This read:

STOP-READ
GATE #2
ALL VISITORS MUST SIGN IN

AT HBE TRAILER
THIS GATE IS RESERVED FOR ALL PERSONNEL
VISITORS AND SUPPLIERS OF THE CONTRACTORS LISTED BELOW
ROUNDOUT ELECTRIC
EW Tompkins
J&K Hearing
Tri State Foundation Waterproofing
NY Professional Drywall

On August 20 and 21, 2008, Counsel for HBE sent to the Carpenters union, a letter and a corrected letter informing the Union about the gates. The letter went on to complain about a union banner that was displayed on August 20, 2008 and which read: "Shame on New York Professional Drywallers." Counsel noted that NYPD was not present at the site and would not be present on a full time basis at the job site until September 15, 2008. It did note, however, that NYPD's representatives would be present every Wednesday to attend meetings and would be at the job site for preparatory work on August 25 to 26. Counsel went on to state that the Union would be advised of any changes to NYPD's schedule.

During the period from about June 2008, Isaac Wagschal, an officer of NYPD, visited the job site for Wednesday meetings. He testified that on only one occasion, did he enter the site by Gate 1 to go to the trailer where the meeting was taking place. On the other hand, union witness, Leo Grabowski testified that he saw Wagschal use Gate 1 on three occasions in June and July 2008. Nevertheless, even if that was the case, NYPD, during that early period of time, was not performing any physical work on the site and did not actually commence work until September 2008. Therefore, these alleged "taints" of the gates by NYPD are not relevant even if true.

The testimony was that all contractors were advised that the project was to have a mix of union and non-union contractors and that there would be two gates, one set up for union contractors, (Gate 1) and the other for non-union contractors, (Gate 2). On September 20, 2008, HBE sent out letters to the contractors reiterating these instructions and attached a map of the site. Some of the construction unions were also sent similar letters. By letter dated September 30, 2008, the Carpenters Union was re-notified of the gate system. It went on to state inter alia:

The personnel, suppliers and visitors of New York Professional Drywall (NYPD) have been instructed to use Gate No. 2 exclusively. Any argument that Gate No. 1 has been tainted by NYPD or any other entity has already been rejected by the NLRB. The NLRB has confirmed the integrity of the ORMC reserved gage system.¹

Any picketing by you union at the site must be limited to Gate No. 2. Picketing at any location other than Gate No. 2 is unlawful secondary activity and all appropriate legal action will be taken. Enclosed is a map of the project which shows where the gates are located.

NYPD commenced actual work at the site on October 6, 2008. And to do their work, NYPD contracted with some suppliers, one of which was Certified Lumber, located in Brooklyn,

¹ It seems that there was another proceeding involving the Electricians Union.

New York. Wagschal testified that in order to make sure that Certified complied with the reserved gate system, he notified Certified to have its driver contact his brother-in-law, Jacob Wieder by phone when he got off Route 17 so that Wieder could meet him off the site and drive him onto the site.

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A delivery was made on November 3, 2008.

There is a dispute as to exactly what happened on the morning of November 3. The Union's agents, Leo Grabowski and Robert Owens testified that they arrived at the site at around 6:15 a.m. prepared to put up their banner at East Main Street, (publicity other than picketing) and to engage in picketing directed at NYPD at Gate 2 on Midway Park. They testified that at around 6:30 they saw Certified's truck come up East Main Street and turn into the construction site by going through Gate 1. Based on this they decided to picket at Gate 1 and did so. They also placed an inflatable rat about 30 yards away from the entrance.

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The Union representatives' testimony about the Certified truck was corroborated by Edward Ward, who is the superintendent of Darlind Construction Company. He testified that just after he entered the site through Gate 1 he noticed that the Certified truck was following behind him and also passed through Gate 1. Ward testified that he then called Grabowski and notified him of this fact. Ward testified that he knew it was Certified's truck because he had seen it at the site before and that it was a boom truck carrying studs. He also testified that he knew it was making a delivery to NYPD because that company was the only company then on the site that was using studs. I note, however, that Ward was not exactly a wholly neutral witness as he is a member of the Carpenters Union and testified that he felt that it was his obligation to notify Grabowski of what he saw. He also acknowledged that his employer, Darlind had been a bidder for the work being done by NYPD. Therefore, Ward's employer would be a potential beneficiary if NYPD was removed from the job site.

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The General Counsel offered the testimony of the truck's driver, Benny Farkas, and of Jacob Wieder. Farkas testified that he was given instructions to call Jacob when he got off Exit 15 on route 17. He states that he left Brooklyn at around 5 a.m. and arrived in Middletown at around 7 or 7:30 a.m. According to Farkas, he called Wieder and waited outside a Mobile station until Jacob came and escorted him up East Main Street, past the first entrance, then making a right hand turn at the light at Midway Park and then into the construction site. From there, he states that he went clockwise around the inside perimeter road until he parked his truck near the building under construction. Farkas testified that he was approached by Isaac Wagschal who told him that he needed to wear a hard hat and that he thereupon unloaded the studs from the truck. According to Farkas he left around 10:00 a.m. via Gate 2.

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Wieder's testimony was essentially the same and he recounted how he received a phone call probably around 8:00 a.m., whereupon he drove out of the site and met Farkas at the Mobile station. Wieder testified that he escorted Farkas back to the site by way of Midway Park Drive and through Gate 2.

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The picketing commenced shortly before 7:00 a.m. at the Gate 1 entrance and lasted until around 11:00 a.m. There has been no further picketing activity by the Carpenters Union at either gate from November 3, 2008 to the present. It does not appear that the picketing which did occur on November 3, 2008 had any affect on the delivery of supplies or materials to the job site by any of the contractors or their suppliers. And although there may have been some union employees who did not work that day, I can't say how many or what percentage of the job site work force left.

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III. Analysis

There is only one factual issue in dispute and that is whether the truck making a delivery of studs to NYPD, entered through Gate 1 on November 3, 2008.

In recounting this incident, which if it occurred, took all of maybe 30 seconds, all of the witnesses gave pretty good accounts of themselves. All were fairly consistent and had others to corroborate their versions. All seemed sincere. All made sense.

If the standard here was that the General Counsel had to prove a critical fact “beyond a reasonable doubt” or by a “clear and convincing standard,” I would find in favor of the Union’s witnesses. But that is not the standard for this type of civil case. All she needs to show is that the evidence on material facts, including credibility, is supported by a preponderance of the evidence.

On balance, I was marginally more impressed by the demeanor and accounts of Jacob Wieder and Benny Farkas, both of whom seemed to me to be both naïve and honest. I don’t think that either really understood the legal significance of their testimony and were therefore less likely to shape their testimony to fit a legal theory. This does not mean that I can say that the Union’s witnesses were not telling the truth. All it means is that having to choose one version of these events over the other, I am choosing to credit the General Counsel’s witnesses by a slim margin.

At construction sites, it is not unusual to have multiple employers performing the various tasks necessary to complete a building. Despite working on a common project, the Supreme Court has held that the contractors and subcontractors at a construction site are not joint employers but rather are separate persons within the meaning of Section 8(b)(4)(B). *Denver Building Trades Council v. NLRB*, 341 U.S. 675, 692 (1951). Because all of these employers are working at a common location, a union having a dispute with one of them, can ordinarily picket at the entrance to a common site so long as it names the entity with whom it has a dispute and pickets at times when that entity is on the site. See *Sailors’ U of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950).

In order to mitigate the effects of picketing at a construction site, employers, if the geography permits, can set up separate entrances so as to isolate the picketing to the entrance designated for the entity with which the Union has a primary dispute. Some of the basic cases regarding reserve gates as applicable to the construction industry are *Building & Construction Trades Council (Markwell & Hartz Inc.)*, 155 NLRB 319 enfd. 387 F.2d 79 (5th Cir. 1967); *Operating Eng’s Local 450 (Linbeck Construction Co.)*, 219 NLRB 997 aff’d 550 F.2d 311 (5th Cir. 1977); and *Teamsters Local 295 (Montgomery Ward & Co., Inc.)* 194 NLRB 1144 (1972).

Nevertheless, having established a reserve gate system, the contractors must make sure that they utilize only the assigned gate. In *Linbeck* supra, the Court held that reserve gates at a construction site may be undermined by the activity of contractors in using the wrong gates. See also, *Local 7, Sheet Metal Workers’ Int’l Ass’n*, 345 N.L.R.B. No. 119. Recently, in *District Council 711, International U of Painters and Allied Trades, AFL-CIO (JC Two, Inc.)* 351 NLRB No. 72, (2007), the Board affirmed the Judge’s findings that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by picketing at a common jobsite at gate reserved for the neutral employers. The Board rejected the argument that the reserve gate system was “tainted” by alleged misuse of neutral gate by the primary employer’s employees.

Having determined that NYPD's supplier did not go through Gate 1, (reserved for union employers and their suppliers), I conclude that the reserve gate system was not tainted. Accordingly, although the picketing lasted for only about 3 hours and has not resumed, I conclude that it was not de minimus, and that the Unions' picketing activity violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Conclusions of Law

By picketing the Orange Regional Medical Center construction site at the entrance reserved for the exclusive use of union contractors and their suppliers, in furtherance of a primary dispute with New York Professional Drywall Corp., the Respondent unions have violated Section 8(b)(4)(i) and (ii)(B) of the Act.

The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend the issuance of an order directing them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondents, the Empire State Regional Council of Carpenters and its affiliate Carpenters Local Union 19, United Brotherhood of Carpenters and Joiners of America its officers, agents and representatives, shall

1. Cease and Desist from

(a) Engaging in, or inducing or encouraging any individual employed by Hospital Building & Equipment Company, (called HBE), or any other employer or person performing work at the Orange Regional Medical Center construction site to engage in a strike or a refusal in the course of his or her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or threatening, coercing, or restraining HBE or any other person on the site, where in either case an object thereof is to force or require HBE to cease doing business with New York Professional Drywall Corp.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days after service by the Region, post at its facility in Connecticut copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Also, if the Unions publish newsletters for its members, this notice should be published therein. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail a copy of the notice to HBE and NYPD.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 28, 2009

Raymond P. Green
Administrative Law Judge

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT engage in, or induce or encourage any individual employed by Hospital Building & Equipment Company, (called HBE), or any other employer or person performing work at the Orange Regional Medical Center construction site to engage in a strike or a refusal in the course of his or her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or threaten, coerce, or restrain such persons, where in either case an object thereof is to force or require HBE to cease doing business with New York Professional Drywall or any other person.

**EMPIRE STATE REGIONAL COUNCIL OF CARPENTERS
and its affiliate CARPENTERS LOCAL UNION 19, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA**

(Union)

Dated _____

By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST

NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 212-264-0346.